MICHAEL RODAK, JR.

Nos. 80-11 and 80-15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

J. GREGORY MERRION and ROBERT L. BAYLESS, d/b/a MERRION AND BAYLESS, et al.,
Petitioners,

v.

JICARILLA APACHE TRIBE, JICARILLA APACHE TRIBAL COUNCIL, and CECIL ANDRUS, Secretary of the Interior,
Respondents.

and

AMOCO PRODUCTION COMPANY, and MARATHON OIL COMPANY,
Petitioners,

v.

JICARILLA APACHE TRIBE, et al., and CECIL ANDRUS, Secretary of the Interior,
Respondents.

ON PETITION
FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE TENTH CIRCUIT

APPENDICES TO BRIEF IN OPPOSITION OF RESPONDENT JICARILLA APACHE TRIBE

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APPENDIX A

Testimony of Richard TeCube
On Direct Examination,
Rec. Vol. VI; pp. 253-266.

RECORD ON APPEAL
UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 78-1154

J. GREGORY MERRION, et al.,)
)
Appellee,)
)
vs.)
)
JICARILLA APACHE TRIBE, et al.,)
)
Appellants.)

Appeal from the United States District Court
For the District of New Mexico

VOLUME VI
AUGUST 29, 1977

RICHARD TECUBE

was called as a witness by the defendants, and having been first duly sworn, testified upon his oath as follows, to-wit:

DIRECT EXAMINATION

BY MR. NORDHAUS:

Q: Will you state your name, please? A: My name is Richard TeCube.

THE COURT: How do you spell that? A: T-e-C-u-b-e.

THE COURT: T-e-C-u-b-e? A: Right, that's correct.

Q: It is capital--it is Te-, capital C, isn't it? A: That's correct.

THE COURT: Well, now, just -- wait a minute. Let me get this name down right. I had it all wrong. I will rub it out and start over. Richard T.? MR. NORDHAUS: T.

Q: Are you an enrolled member of the Jicarilla Apache Tribe? A: Yes, I am.

Q: Are you a member of the Jicarilla Apache Council? A: Yes, I am.

Q: How long have you been on the council? A: I am starting my fourth year. It is a four-year term so I have been on three years.

THE CLERK: Sir, could you speak up, please?

Q: Will you speak up. Could you get closer to the mike? A: I have been on the council three years.

Q: Three years.

THE COURT: Well, now, let's see. I have four down here. Just three? A: Three years.

Q: Will you state what your regular employment is other than being a member of the tribal council? A: I work for the tribe as economic development planner.

Q: How long have you been the econnomic development planner?

A: I have been the plannner for four years.

Q: What is you education, college and graduate school, if any? A: I have a Bachelor of Science degree from Colorado State University in Fort Collins.

THE COURT: I can't understand you.

Q: You will have to talk a little slower, Richard, and a little -- make it --

THE COURT: Can you talk so I understand you? A: Yes, sir, I can.

THE COURT: Well, I am afraid that thing might be worse than him just talking. I don't know. It may be, it might not.

THE CLERK: I will turn it off, sir.

Q: Talk a little slower and -- if you can, Mr. TeCube. A: Well, would you repeat the question, please?

Q: Yes. What is you education? A: My education is that I have a college degree from Colorado State Univesity, and I also have done a years graduate work at the University of Washington in Seattle.

Q: What was your field of graduate study? A: My field of graduate study was in public administration.

Q: What are your responsibilities as economic development planner, if you can outline those? A: Again, on my job entails plannning in the general area of economic development which is divided into business development, industrial development, natural resource development, human resource development, and community development.

Q: Have you, as a councilman and as economic development planner, studied the Tribe's present and the future requirements regarding the use of its resources? A: Yes, I have.

Q: What kind of studies have you made with respect to its oil and gas resources and the use of those resources?

MR. COONEY: May it please the Court, Your Honor, we are going to object to this testimony. I don't see what relevance the Tribe's plans for use of its resources have to do with the validity under the law of the oil and gas severance tax.

THE COURT: Yes. What is the purpose of this, counselor?

MR. NORDHAUS: Your Honor, we are demonstrating the need of the Tribe.

THE COURT: The need for the tax?

MR. NORDHAUS: The need for the tax, yeah.

THE COURT: Well, that isn't the question.

MR. NORDHAUS: And we are also -- well, Your

Honor, it is a question of what is the -- what is the regulation -- the reasonableness of the tax in relation to its burden on commerce and the need of the taxing government for the revenues.

THE COURT: Well, I don't think that that's relevant, what the need is. Why don't you make your offer of proof here so you will have it in the record.

MR. NORDHAUS: We will expect to show by this witness that the Tribe has made a long-range study of its needs for development of resources, its needs for development of revenues to support tribal operations, its needs for creating employment on the reservation. We will tender proof to show a very low per capita income, a very high unemployment rate, an effort by the Tribe to utilize the resources, to improve the condition of Tribe members over a long period of time, to provide education for Tribal members, to provide employment, to provide social services, and that -- there will be a requirement to use its royalty income for industrial uses.

We will show that the Tribe has in litigation with two major pipeline companies, has secured agreements to transport its royalty gas where needed on the reservation for use by the tribal govenment for industry, for agriculture, that in connection with the use of the royalty gas, the Tribal revenues will be depleted because the royalty gas is a main source of tribal income, the royalties obtained from gas. It supports the Tribe, it supports all the government activities of the Tribe, the royalties we will show, will decrease as the Tribe's oil and gas resources are depleted, that to replace this royalty income, the Tribe will require other substantial income, that as a local -- as a viable government, it is entitled to tax, that it will need the tax revenue, that the severance --

THE COURT: Now, when you say "entitled to tax", that's something else, again. And I don't want to --

MR. NORDHAUS: Well, what I am saying is assuming that we will -- we will say, assuming that the Tribe is entitled to tax, the Tribe will need that tax.

THE COURT: Well, that's all right. I didn't -- from what you said, why you said that the Tribe is entitled to tax.

MR. NORDHAUS: All right. I will say, assuming the Tribe is entitled to tax --

THE COURT: Yes. That is different.

MR. NORDHAUS: The Tribe is -- it will need the tax to -- in the future to protect its income and to provide in the future the governmental services it provides now, and I will cite *Parker against Brown*, 315 U.S. 341, that it is a reasonable --

THE COURT: Just a minute. Let me get that down. 315 --

MR. NORDHAUS: 317 U.S. --

THE COURT: I thought you said 315. 317?

MR. NORDHAUS: 317 U.S. 341, Parker against Brown, that this severance tax is a reasonable governmental means to a reasonable end, and this whole line of testimony will show that it is a -- not only a reasonable means to the reasonable end which is preservation of the economy and the -- really the survival of the Tribe by providing the revenue which will be gone when the royalties are gone.

We will show that the tribal gas production has diminished, has decreased from around fifty-five thousand in '72 or '73 to thirty-five -- excuse me -- fifty-five million m.c.f. in 1972 to thirty-five million m.c.f. in 1975.

It increased in '76 because of increased drilling, but the eventual cessation of production in the next thirty or forty years is inevitable.

Therefore, we will show that it is necessary for the preservation of the Tribe to exact this tax. We will show that it is reasonable to -- for the Tribe to levy this tax, put it into a permanent fund, and at the end of the twenty-five or thirty years, the income from this permanent fund will supply the revenues that will replace the royalties now received.

The State of New Mexico has the same provision in its permanent fund to provide for its eventual depletion of resources, and diminution of royalties. In that respect, the evidence will show as a background the economy of the Tribe, the -- as I say, the very low per capita income, the high rate of unemployment, the need for industry on the reservation which will be provided by the royalty gas which, in turn, will diminish tribal revenues.

It will also show that this gas and oil production is all transported off the reservation prior to use, that the contention of the plaintiffs that this tax is discriminatory because the exempt gas used on the reservation, is not a reasonable objection because all oil and gas is transported off the reservation, the gas has to be transported off the reservation for processing to make it suitable for use in industry or in the home. Oil has to be transported off the reservation prior to use for processing in a refinery. This testimony will show that the exemption in the ordinance is prospectively to exempt royalty gas used by the tribal government for tribal purposes, similar to exemption of state -- of state property which is used by the state government.

We will show there is no instance where gas or oil is produced and not transported off the reservation. We will show, therefore, the exemption is not discriminatory. That in general, is what we expect to prove by this witness, and we submit that it is entirely relevant to the -- to establish the Tribe's -- the reasonableness as a tax under *Parker vs. Brown.*

There is another aspect of this, Your Honor. Under the Fiscal Assistance Act of 1976 -- that's 90 Statutes, 499, which is the revenue sharing act.

THE COURT: What is the citation in the U.S.C.A.?

MR. NORDHAUS: I don't have the U.S.C.A. citation. I will get that for you, Your Honor.

THE COURT: You see, I don't have what you are talking about there.

MR. NORDHAUS: It is the revenue sharing act, and I don't know whether it is codified yet.

THE COURT: You don't know what?

MR. NORDHAUS: I don't know whether it is codified yet. It is the '76 act. It is 90 Statutes, 1499, and these -- all of these revenue sharing acts define Indian governments as a local government entitled to participate in revenue sharing, and one of the criteria for this sharing, one of the qualifications is the generation by these local governments of tax revenue.

The more tax revenues local governments generate themselves, the more revenue sharing funds they are entitled to. So we -- in the course of this we have to show the Court and show -- and put in the record the generation of tax funds and the reason for generation of tax funds.

I don't have anymore to say, Your Honor.

THE COURT: Well, you have made your record and I will deny any of the evidence. There was only one thing in your argument that I didn't know whether should be gone into and that is as a matter of exemptions.

MR. COONEY: Your Honor, we would submit that the ordinance speaks for itself on that, and the instructions issued to the operators speak for themselves, and this witness isn't qualified to render a legal opinion to the Court as to what the ordinance really means about exemptions.

THE COURT: I think you are right on that. All right. Proceed.

MR. NORDHAUS: Is Your Honor going to let me question this witness?

THE COURT: Not on this matter you have mentioned. I had you make an offer of proof and that's denied.

If there's something else, why --

Q: Mr. TeCube, is all of the oil and gas produced on the reservation transported off the reservation prior to use except for that oil and gas used by lessees in their

production and development operations? A: This is correct at the present time.

Q: Where does the gas for tribal use come from, natural gas? A: We buy our natural gas from a pipeline company. I believe it is owned by Gas Company of New Mexico. They have a franchise agreement whereby they serve the community.

Q: That gas -- that pipeline comes from off the reservation, is that not correct? A: That's correct.

Q: Mr. TeCube, to your knowledge, does the State of New Mexico provide any substantial services to the Jicarilla Apache Tribe?

MR. BLACK: Your Honor, I am going to object to this. I don't know first of all what substantial services are, or this witness' background to say what the State gives to the Tribe. But I don't see what the significance of the State giving them any service has to do with an invalid tax or a valid tax. If the tax is invalid, then it doesn't make any difference.

THE COURT: Well, I will let him answer and then we will -- I will decide.

MR. NORDHAUS: One of the contested issues of fact is whether --

THE COURT: Well, I have already ruled in your favor. Do you want me to change my ruling?

MR. NORDHAUS: No, no, sir.

THE COURT: Well, go ahead.

Q: Do you know what, if any services, the State provides on the Jicarilla Apache Reservation? A: They provide very little service to the best of my knowledge. They provide some educational service to the public school system and they provide -- maintain a police -- patrolman there, but they deal more with nonIndians than Indians and they do maintain a State Highway Department which also includes the reservation and nonreservation portion of the state roads on the reservation.

MR. COONEY: Your Honor, I would move to strike that as nonresponsive. What he gave us was not a description of the services, but his opinion that they are not very good.

THE COURT: Well, I will let it stay in. He said the public schools and highways.

Q: Do you have a game and fish operation on the reservation? A: By the way of tribal game and fish department.

Q: Does the State of New Mexico provide any services with respect to the tribal game and fish operation? A: Yes. To a small degree, I think we have an annual arrangement for -- we have the use of a helicopter to count wildlife on the reservation, primarily deer and elk.

Q: Do you know whether the state stocks game or fish on the reservation? A: No, we [sic] don't.

Q: Does the Tribe, if you know, collect state game and fish license fees? A: Yes. This is a requirement we have for every hunter who comes on to the reservation must possess also a state license.

Q: Does the Tribe have its own license and hunting and fishing fees? A: Yes, we do.

Q: Do you know, and tell me -- state if you know, what those fees are for various game and fish. A: I don't know what that is. There's several different taxes or fees.

THE COURT: I guess it depended on whether you are hunting elk or whether you are hunting deer.

MR. NORDHAUS: Well, I asked him for the different types of game.

THE COURT: Yes.

Q: Does the State of New Mexico provide police services on the reservation? A: Well, as I have stated previous, they have a patrolman located in Dulce, and he deals -- he patrols the state roads, and works with nonIndian offenses.

Q: NonIndian offenses on the state road? A: (Witness nods head.)

Q: You have -- how many state roads do you have running through the reservation? A: We have two state roads.

Q: What are they? A: State Highway 44 and State Road 537.

Q: State Road 44 runs from Cuba to Farmington, is that correct? A: That's correct.

Q: And where does five thirty-seven go? A: Five thirty-seven connects State Highway 44 at the south end with U.S. Highway 84 on the north half.

Q: All right. Runs generally through the reservation? A: Yes.

Q: Who built the north-south road five thirty-seven? A: The Bureau of Indian Affairs constructed five thirty-seven.

Q: And then that was -- what --- was that turned over to the state? A: Yes, it was.

Q: Does the Jicarilla Apache Tribe --

THE COURT: Just a minute, now. I think you said the Bureau of Indian Affairs. That wasn't the Tribe? That was the United States, wasn't it? A: Yes, that is an agency of the federal government.

THE COURT: Yes.

Q: Does the Tribe itself provide road maintenance? A: Yes, the Tribe has a tribal road department.

Q: Is that budgeted out of the tribal funds? A: That's correct.

Q: The Tribe -- then advise the Court whether or not the Tribe maintains a police department and whether or not that is paid out of tribal funds?

MR. BLACK: Your Honor, I think we are getting

into exactly the areas Mr. Nordhaus offered. If the Court wishes to hear them, we don't object, but --

THE COURT: Well --

MR. BLACK: -- again --

THE COURT: Well, if you are getting into what the money is used for, why, I am going to sustain the objection. Is that what you wanted to do?

Appendix B

Report of Dr. Alfred L. Parker,
The Economic Impact of a Proposed Oil and Natural Gas Severance Tax, July 1976.
Defendant's Exhibit N,
Book of Exhibits, CCA 10th.

The Economic Impact of a Proposed Oil and Natural Gas Severance Tax
July, 1976

The analysis presented below is to indicate the impact on Jicarilla tax revenues and on intrastate and interstate consumers of a proposed severance tax on oil and natural gas produced from Jicarilla leases. The analysis is presented under these general headings: purpose of the proposed tax, oil and natural gas severance tax to be levied, tax revenue generated by the tax, impact of the proposed severance tax, and summary.

Purpose of the Proposed Tax

Oil and natural gas production from Jicarilla leases represent the export of important nonrenewable resources of the Jicarilla Apache Nation. The royalties derived from oil and gas production are clearly an important source of financial support for the Tribe. Table 1 provides a summary of royalties obtained from oil and natural gas in the period 1970-1975.

Tribal royalties have been artifically depressed as a result of federal government control of oil and natural gas wellhead prices. The Federal Power Commission policy of maintaining the wellhead price of interstate natural gas significantly below market value and Federal Energy Administration control of the price of "old oil" have resulted in significantly lower royalty revenues for the Tribe.

Table 1

Jicarilla Oil and Natural Gas Royalties
1970-1975

	Oil Royalties	Natural Gas Royalties
1970	$283,877	$1,038,877
1971	262,978	944,684
1972	293,123	1,240,091
1973	252,670	1,299,251
1974	609,841	1,763,181
1975	414,960	1,583,158

Source: Data supplied by U.S.G.S. Roswell, New Mexico.

It is clearly important that the Tribe not permit its nonrenewable resources to be depleted without providing for the welfare of future generations. This can perhaps best be achieved through the development of a "permanent fund". This permanent fund to provide financial security and financial support for the Jicarilla Apache Nation in the future.

It is anticipated that a significant portion of the revenue to be collected from the proposed severance tax will be placed in such a permanent fund. Current royalty payments are not sufficient, because of the artificially depressed prices of oil and natural gas, to meet current financial requirements and contribute at same time to the development of this permanent fund.

The Jicarilla Apache Nation has experienced and it is expected will continue to experience significant administrative costs directly related to leasing, supervision and other administrative activity associated with the development and operation of their oil and natural gas resources. A portion of the revenue from the proposed severance tax would be used to cover these administrative costs.

Oil and Natural Gas Severance Tax to be Levied

The proposed severance tax would establish a tax on the nonrenewable energy resources of the Jicarilla Apache Nation of approximately 5¢ per MMBtu. Operators of

natural gas leases are now required to measure and report the Btu content of natural gas extracted from Jicarilla leases. The availability of this Btu data would make the calculation of required tax payments a very simple process.

Oil and Natural Gas Severance Tax

Product	*Tax Rate*
Natural Gas	5¢ per MMBtu
Crude Oil	29¢ per barrel

Accurate data on the Btu content of crude oil is not so readily available. For this reason, the rate on crude oil has been set at 29¢ per barrel. In setting the rate, it is assumed that crude oil contains 5.8 million Btu per barrel. (Mineral Industry Survey of the U.S. Department of the Interior, Bureau of Mines dated December 1975 reports that the average Btu content of crude petroleum produced in the United States was 5,800,000/barrel for the years 1970 through 1975.) At 5¢ per MMBtu this would be a tax of 29¢ per barrel.

Tax Revenue Generated by the Tax

Estimates of the tax revenue that would be generated by the proposed severance tax are based on U.S.G.S. Roswell, New Mexico production data for 1975. Using an estimate of 1164 Btu per cubic foot of natural gas, approximately 41,903,367 MMBtu were produced from Jicarilla leases. Thus, the proposed severance tax on natural gas would generate an additional $2,095,168 in tax revenue for the Jicarilla Apache Nation.

1975 Production

Natural Gas

35,999,456 Mcf
× 1164 Btu

41,903,367 MMBtu × 5¢ per MMBtu = $2,095,168

Crude Oil

411,884 Barrels × 29¢ per barrel = 119,446

Total Revenue $2,214,614

The U.S.G.S. Roswell, New Mexico reports that 411,-

884 barrels of crude oil were produced in 1975 from Jicarilla leases. The proposed severance tax would, based on 1975 production, generate $119,446 in additional tax revenue for the Jicarilla Apache Nation.

The proposed severance tax would thus generate a total of approximately $2,214,624 in additional revenue a substantial portion of which would be placed in a permanent fund and the remainder used to cover administrative costs associated with the development and operation of tribal oil and gas leases.

Impact of the Proposed Severance Tax

The proposed severance tax on oil and natural gas would be imposed on all natural gas severed, saved and removed from Tribal lands. The *limited burden* of the proposed tax on the intrastate and interstate consumer (assuming the increased cost is passed on) may be illustrated using production and price data available for 1974 and 1975.

Data is not now available to measure precisely the impact on New Mexico consumers of petroleum and petroleum products. What evidence is available suggests that it will be very small indeed. More specifically, it cannot be argued that the price of petroleum and petroleum products to New Mexico consumers would increase proportionately. In fact, little oil is processed in the state of New Mexico for consumption in New Mexico. As a result , oil from Jicarilla leases is commingled with production from other areas, refined and distributed throughout the Western states. The burden of the proposed severance tax is thus, in a major degree, shifted to consumers outside the state of New Mexico.

The proposed severance tax will have a more direct and more easily quantifiable impact on the New Mexico consumer of natural gas. Based on 1975 data, the additional tax burden resulting from the severance tax on natural gas is estimated at $2,095,168. This tax burden (assuming it is passed on to the consumer) will be shared by consumers of natural gas (both intrastate and interstate) and consumers of liquid hydrocarbons (both intrastate and interstate). A Federal Power Commission publication *Sales by*

Producers of Natural Gas to Interstate Pipeline Companies indicates that the Btu content of *dry* natural gas transported by El Paso Natural Gas from the San Juan Basin averaged 1083 Btu per cubic foot. U.S.G.S. Roswell, New Mexico reports an average Btu content for *wet* natural gas from Jicarilla leases of 1164 Btu per cubic foot. Based on this data 93% of the tax burden (1083 ÷ 1164) will be allocated to consumers of natural gas. The remaining 7% allocated to consumers of liquid hydrocarbons. Thus, in the analysis which follows it will be assumed that $1,948,506 of the tax burden (93% × $2,095,168) will be borne by consumers of natural gas and $146,662 of the tax burden (7% × $2,095,168) will be borne by consumers of liquid hydrocarbons.

Impact on Intrastate Consumers of Natural Gas

Data supplied by U.S.G.S. Roswell, New Mexico indicate that during the years 1972 through 1975 the Southern Union Gas Company purchased approximately 35 percent of the gas produced from Jicarilla leases. A more recent review by U.S.G.S. of Southern Union purchases from Jicarilla leases suggests their purchases may be as much as 40 percent of total Jicarilla production. Using this 40 percent figure, we can conclude that New Mexico consumer's tax burden would increase by approximately $779,402. This figure is obtained by multiplying 40 percent times estimated tax burden to be borne by consumers of natural gas $1,948,506.

During the twelve months ending December 31, 1976 Southern Union Gas Company (and Southern Union Gathering Company) purchased 131,923,549 Mcf of natual gas for sale to New Mexico consumers. The estimate of Southern Union purchases of natural gas from Jicarilla leases (12,305,992 Mcf) was less than 10 percent (9.3%) of the total Southern Union purchases of natural gas for sale to New Mexico consumers.

Based on this information the increase in the average cost of natural gas to the New Mexico consumer is estimated at 6/10 of one cent (or $ .006) per Mcf. This estimate is obtained by dividing the estimated additional tax burden

on New Mexico consumers of natural gas $779,402, by total natural gas purchased by Southern Union for sale to New Mexico consumers 131,923,549 Mcf.

Data from the 1974 *Annual Report* of the New Mexico Public Service Commission is also helpful in placing this tax in perspective.

Natural Gas Utilities Customer Statistics 1973

	Residential and Rural	Commercial & Industrial	All Other	Total
Average Annual Mcf Used Per Customer	124	2.704	5.333	453
Average Gross Revenue Per Mcf Sold	$ .98	$ .43	$ .37	$ .56
Average Annual	$125.80	$1,160.93	$1,979.03	$256.00

According to these 1973 figures the proposed severance tax would increase the *average annual bill* of residential and rural customers by approximately 74 cents. New Mexico commercial and industrial customers would find their average annual bill increased by approximately $16.22.

Impact on Interstate Consumers on Natural Gas

As indicated in an earlier section of this report, Southern Union purchases approximately 40 percent of the natural gas produced from Jicarilla leases. The remaining 60 percent is purchased by two interstate pipeline companies, El Paso Natural Gas Company and Northwest Pipeline Company. Thus, it is estimated that interstate pipeline companies purchased approximately 21.6 billion cubic feet of natural gas produced from Jicarilla leases in 1975 (60 percent × 35,999,456 Mcf).

A substantial portion of the natural gas purchased in New Mexico by El Paso Natural Gas Company is delivered to Pacific Gas and Electric Company. (PG & E, a California firm) at the Arizona-California border. According to the prepared testimony of John A. Sproul, Vice President - Gas Supply of Pacific Gas and Electric Company, "In

1972, approximately 409 billion cubic feet of gas was purchased from El Paso Natural Gas and this accounted for over 40 percent of our total gas purchases". (Pacific Gas and Electric Company, Gas Department, Proposed Testimony in Support of Offset Rate Proposal, Application No. 53866, Exhibit No. 1, p. 2).

In order to obtain some indication of the impact of the proposed severance tax on interstate consumers of natural gas the following assumptions will be made: that interstate pipeline companies purchased 60 percent of the natural gas produced from Jicarilla leases, that all the natural gas purchased by interstate pipelines was delivered by El Paso to PG & E, that in 1975 El Paso sold 409 billion cubic feet of natural gas to PG & E (the same amount it sold to PG & E in 1972), that in 1975 PG & E purchases from El Paso Natural Gas were still approximately 40 percent of their total gas purchases, and that the Btu content of natural gas delivered by El Paso Natural Gas to PG & E was 1083 Btu per cubic foot.

Based on these assumptions the tax burden to be borne by PG & E customers will equal $1,169,104, which is 60 percent of the total to be borne by customers of dry natural gas, $1,948,506. The natural gas from Jicarilla leases purchased by interstate pipeline companies was approximately 5.3 percent of the total delivered to PG & E by El Paso. A tax averaging 5.4 cents per Mcf would thus increase the average cost of gas delivered to PG & E by El Paso Natural Gas by approximately 3/10 of one cent per Mcf (.053 × $ .054 = $ .0028). The effect on the average price of natural gas for PG & E customers would be an increase of approximately 1/10 of one cent per Mcf (.40 × $ .0028 = $ .0011).

The 1974-75 *Annual Report* of the California Public Utilities Commission reports that "average gas usage per firm customer" for the years 1970 through 1974 averaged 138.0 Mcf. The severance tax would thus increase the average annual bill of the California customer by approximately 15 cents.

Impact on Consumers of Liquid Hydrocarbons

It has been estimated (based on the relative Btu content of wet and dry natural gas) that consumers of liquid hydrocarbons will bear $146,662 or approximately 7 percent of the total tax burden resulting from the severance tax on natural gas.

Data on New Mexico consumption of liquid hydrocarbons is not currently available. It is therefore difficult to estimate the precise impact on the average New Mexico consumer. Some perspective of the impact is provided by the examination of production data available from the New Mexico Oil and Gas Engineering Committee.

The *Annual Report* of the New Mexico Oil and Gas Engineering Committee, Hobbs, New Mexico, Volume II, Northwest New Mexico, 1975, reports the following summary of extraction plant operations in the San Juan Basin in 1975.

Total Intake	339,836,594 Mcf.
Gasoline	3,373,701 BBLS,
Butane	4,027,708 BBLS.
Propane	4,585,225 BBLS.
	11,986,634 BBLS.

Thus, .03 bbls. of liquid hydrocarbons were produced for every Mcf of natural gas intake from the San Juan Basin. Applying this relationship to the natural gas production from Jicarilla leases provides an estimate of liquid hydrocarbon production from Jicarilla natural gas of 1,079,984 bbls. (.03 × 35,999,456 Mcf = 1,079,984 bbls).

The tax burden may therefore be estimated at 13.6 cents per barrel ($146,662 ÷ 1,079,984 bbls = $ .136) or .003 cents per gallon of liquid hydrocarbons.

Summary

The proposed severance tax on oil and natural gas produced from Jicarilla leases will provide significant additional tax revenue for the Jicarilla Apache Nation. This revenue will partially offset the effect on Tribal revenues

of artifically depressed levels of oil and natural gas wellhead prices and thus provide funds for the development of a "permanent fund" and the payment of administrative costs associated with the development of these energy resources. This can be accomplished without significantly increasing the cost of these fuels to the ultimate consumer.

Alfred L. Parker
Professor of Economics
University of New Mexico

APPENDIX C

NATURAL GAS POLICY ACT OF 1978
EXCERPT

SECTION 110
P. L. 95-621
92 STAT. 3369

SEC. 110. TREATMENT OF STATE SEVERANCE TAXES AND CERTAIN PRODUCTION-RELATED COSTS.

(a) ALLOWANCE FOR STATE SEVERANCE TAXES AND CERTAIN PRODUCTION-RELATED COSTS.—Except as provided in subsection (b), a price for the first sale of natural gas shall not be considered to exceed the maximum lawful price applicable to the first sale of such natural gas under this subtitle if such first sale price exceeds the maximum lawful price to the extent necessary to recover—

(1) State severance taxes attributable to the production of such natural gas and borne by the seller, but only to the extent the amount of such taxes does not exceed the limitation of subsection (b); and

(2) any costs of compressing, gathering, processing, treating, liquefying, or transporting such natural gas, or other similar costs, borne by the seller and allowed for, by rule or order, by the Commission.

(b) LIMITATION ON STATE SEVERANCE TAXES.—The State severance tax allowable under subsection (a) (1) with respect to the production of any natural gas may not include any amount of State severance taxes borne by the seller which results from a provision of State law enacted on or after December 1, 1977, unless such provision of law is equally applicable to natural gas produced in such State and delivered in interstate commerce and to natural gas produced in such State and not so delivered.

(c) DEFINITION OF STATE SEVERANCE TAX.—For purposes of this section, the term "State severance tax" means any severance, production, or similar tax, or other levy imposed on the production of natural gas—

(1) by any State or Indian tribe (as defined in section 106 (b) (2) (B) (ii); and

(2) by any political subdivision of a State if the authority to impose such tax, fee, or other levy is granted to such political subdivision under State law.

Appendix D

Form 5-157,
Oil and Gas Mining Lease,
Tribal Indian Lands.
Tribal Lease Contract No. 119
Joint Appendix, CCA 10th, pp. 188-194.
(Excerpts)

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
OIL AND GAS MINING LEASE—
TRIBAL INDIAN LANDS
JICARILLA APACHE TRIBE, STATE OF NEW MEXICO

THIS INDENTURE OF LEASE, made and entered into in quintuplicate this 24th day of April, 1953, by and between Frank Vigil, Chairman of the Jicarilla Apache Tribal Council of Dulce, State of New Mexico, for and on behalf of the Jicarilla Apache Tribe of Indians, designated herein as lessor, and Phillips Petroleum Company of Bartlesville, State of Oklahoma, herein designated as lessee:

WITNESSETH

1. Lessor, in consideration of a cash bonus of $71,845.99, paid to the Treasurer of said Tribe where the tribe is organized under the act of June 18, 1934 (48 Stat. 984), or to the Superintendent of the Indian Agency having jurisdiction, hereinafter called the superintendent, where the tribe is not organized under said act of June 18, 1934, receipt of which is hereby acknowledged and in consideration of rents and royalties to be paid, and the covenants to be observed as herein set forth, does hereby grant and lease to the lessee the exclusive right and privilege to drill for, mine, extract, remove, and dispose of all the oil and natural gas deposits in or under the following-described tracts of land situated in the county of Rio Arriba, State of New Mexico, and more particularly described as follows: (description omitted.) containing 2587.18 acres more or less, together with the right to construct and maintain thereupon all works, buildings, plants, waterways, roads, telegraph and telephone

lines, pipe lines, reservoirs, tanks, pumping stations, or other structures necessary to the full enjoyment hereof for the term of 10 years from and after the approval hereof by the Secretary of the Interior and as much longer thereafter as oil and/or gas is produced in paying quantities from said land.

2. The term "oil and gas supervisor" as employed herein shall refer to such officer or officers as the Secretary of the Interior may designate to supervise oil and gas operations on Indian lands. The term "superintendent" as used herein shall refer to the superintendent or other official in charge of the Indian Agency having jurisdiction over the lands leased.

3. In consideration of the foregoing, the lessee hereby agrees:

(*a*) *Bond.*—To furnish such bond as may be required by the regulations of the Secretary of the Interior, with satisfactory surety, or United States bonds as surety therefor, conditioned upon compliance with the terms of this lease.

(*c*) *Rental and royalty.*—To pay, beginning with the date of approval of the lease by the Secretary of the Interior or his duly authorized representative, a rental of $1.25 per acre per annum in advance during the continuance hereof, the rental so paid for any one year to be credited on the royalty for that year, together with a royalty of 12½ percent of the value or amount of all oil, gas and/or natural gasoline, and/or all other hydrocarbon substances produced and saved from the land leased herein, save and except oil, and/or gas used by the lessee for development and operation purposes on said lease, which oil and gas shall be royalty free. During the period of supervision, "value" for the purposes hereof may, in the discretion of the Secretary, be calculated on the basis of the highest price paid or offered (whether calculated on the basis of short or actual volume) at the time of production for the major portion of the oil of the same gravity, and gas, and/or natural gasoline, and/or all other hydrocarbon substances produced and sold from the field where the leased lands are situated, and the actual

volume of the marketable product less the content of foreign substances as determined by the oil and gas supervisor. The actual amount realized by the lessee from the sale of said products may, in the discretion of the Secretary, be deemed mere evidence of or conclusive evidence of such value. When paid in value, such royalties shall be due and payable monthly on the last day of the calendar month following the calendar month in which produced; when royalty on oil produced is paid in kind, such royalty oil shall be delivered in tanks provided by the lessee on the premises where produced without cost to the lessor unless otherwise agreed to by the parties thereto, at such time as may be required by the lessor: *Provided,* That the lessee shall not be required to hold such royalty oil in storage longer than 30 days after the end of the calendar month in which said oil is produced: *And provided further,* That the lessee shall be in no manner responsible or held liable for loss or destruction of such oil in storage caused by acts of God. All rental and royalty payments, except as provided in section 4 (c) shall be made by check or draft drawn on a solvent bank, open for the transaction of business on the day the check or draft is issued, to the order of the treasurer of said tribe* or the superintendent. All such rental and royalty payments shall be mailed to the oil and gas supervisor for transmittal to the treasurer of said tribe or to the superintendent. It is understood that in determining the value for royalty purposes of products, such as natural gasoline, that are derived from treatment of gas, a reasonable allowance for the cost of manufacture shall be made, such allowance to be two-thirds of the value of the marketable product unless otherwise determined by the Secretary of the Interior on application of the lessee or on his own initiative, and that royalty will be computed on the value of gas or casinghead gas, or on the products thereof (such as residue gas, natural gasoline, propane, butane, etc.), whichever is the greater.

(*d*) *Monthly statements.*—To furnish to the oil and gas

* All payments under this lease shall be made to the superintendent where the tribe affected is not organized under the act of June 18, 1934 (48 Stat. 984).

supervisor monthly statements in detail in such form as may be prescribed by the Secretary of the Interior, showing the amount, quality, and value of all oil, gas, natural gasoline, or other hydrocarbon substances produced and saved during the preceding calendar month as a basis upon which to compute, for the treasurer of said tribe or the superintendent, the royalty due the lessor. The leased premises and all wells, producing operations, improvements, machinery, and fixtures thereon and connected therewith and all books and accounts of the lessee shall be open at all times for the inspection of any duly authorized representative of the Secretary of the Interior.

The attached Special Stipulations in one page and the Forest and Land Protection Stipulations in two pages, are hereby made a part of this lease.

IN WITNESS WHEREOF, the said parties have hereunto subscribed their names and affixed their seals on the day and year first above mentioned: (Signatures and approvals omitted)

Jicarilla Tribal Lands

FOREST AND LAND PROTECTION STIPULATIONS

The land embraced in this lease issued under the Act of May 11, 1938 (52 Stat. 347), as amended, being within the Jicarilla Indian Reservation, the lessee hereby agrees: (Stipulations omitted.)

(7) The foregoing stipulations are hereby made a part of Oil and Gas Lease executed April 24, 1953, covering TRACT No. 216.

Lessee: Phillips Petroleum Company
(Signatures omitted.)

Jicarilla Tribal Land Oil and Gas Lease

SPECIAL STIPULATIONS (omitted)

APPENDIX E

REVISED CONSTITUTION OF THE JICARILLA APACHE TRIBE

DECEMBER 15, 1968

(EXCERPT)

ARTICLE XI—POWERS OF THE TRIBAL COUNCIL

Section 1. The inherent powers of the Jicarilla Apache Tribe, including those conferred by Section 16 of the Act of June 18, 1934, (48 Stat. 984), as amended, shall vest in the tribal council and shall be exercised thereby subject only to limitations imposed by the Constitution of the United States, applicable Federal statutes and regulations of the Department of the Interior, and the restrictions established by this revised constitution.

(a) *Management of tribal lands and natural resources:*

1. *Leasing.* In the leasing of tribal lands, first preference shall be given, whenever feasible and in the best interest of the tribe, to tribal members or associations of members.

2. *Regulations.* Land use codes and regulations may be adopted by the tribal council to govern land use, including the assignment of tribal lands to tribal members for individual use.

3. *Resource Development.* Tribal lands and natural resources may be developed for industrial or other purposes providing that such development is based upon sustained yield principles wherever applicable and provided that such development is designed for the general welfare of the tribe as a whole. The tribal council may enact ordinances to govern the development of tribal lands and other resources.

4. *Inalienability of Tribal Lands.* The tribal lands shall be inalienable.

(b) *Subordinate organizations.* The tribal council may, with the approval of the Secretary of the Interior, authorize and regulate tribal corporations, associations

and other subordinate organizations for economic and other purposes, and may transfer tribal assets thereto for management and control, provided that such subordinate organizations, including the tribal corporation chartered pursuant to the provisions of Section 17 of the Act of June 18, 1934, (48 Stat. 984), shall exercise control over tribal land, natural resources, and other property or assets of the tribe only to the extent that such control has been transferred to such subordinate organization by positive enactment of the tribal council.

(c) *Tribal funds.* The tribal council shall be responsible for management of all funds within the control of the tribe, and may appropriate available tribal money for public, business and governmental purposes, provided that such appropriations are incorporated in and expended in conformity with annual budgets subject to the approval of the Secretary of the Interior or his authorized representative and provided further that:

1. The tribal council shall provide for adequate accounting of all tribal financial transactions, including a comprehensive annual audit, and for adequate bonding of tribal officials and employees who are directly responsible for the receipt, disbursement and custody of tribal funds.

2. The council shall maintain a capital reserve fund with tribal revenues, into which there shall be deposited each year no less than fifteen percent (15%) of the total annual income for the preceding fiscal year, and shall arrange for the investment of the funds. No per capita distribution shall ever be made from the principal of such capital reserves except by the consent of 75% of the qualified voters of the tribe and with the approval of the Secretary of the Interior.

3. The tribal council may declare an annual dividend for equal distribution to each member of the tribe living and enrolled as of the date such dividend is declared; provided that funds designated

for dividend purposes shall be restricted to the annual income remaining after tribal operational costs, and the deposit into the capital reserve fund, as required by (2) above, have been deducted.

4. The tribal council shall have the power to borrow money for business and development purposes, but when such loans are negotiated with non-Federal sources of credit, the terms of the loan agreement shall be subject to approval by the Secretary of the Interior.

(d) *Peace and order.* Subject to approval by the Secretary of the Interior, the tribal council may enact ordinances to promote the peace, safety, property, health and general welfare of the people of the reservation; to provide for the appointment of guardians for minors and mental incompetents; and to provide for the removal or exclusion from the reservation of any non-member whose presence may be found by the tribal council to be injurious to members of the tribe. In addition, the tribal council shall provide for the enforcement of tribal ordinances on the reservation, and shall prescribe the powers, rules and procedures of the tribal courts in the adjudication of cases involving criminal offenses, domestic relations, civil actions, and the inheritance and probate of non-trust real and personal property of members of the tribe and non-member Indians within the reservation.

(e) *Taxes and fees.* The tribal council may levy and collect taxes and fees on tribal members, and may enact ordinances, subject to approval by the Secretary of the Interior, to impose taxes and fees on non-members of the tribe doing business on the reservation.

(f) *Conduct of tribal affairs.* The tribal council may enact ordinances for the regulation of its own procedures, including: power of subpoena; the power to administer oaths and affirmation; the power to adopt and amend bylaws; and the council may appoint subordinate boards, commissions, committees, tribal officials and employees not otherwise provided for in this constitu-

tion, and may prescribe their salaries, tenure and duties.

Sec. 2. Any resolution, ordinance or other enactment which, by the terms of this constitution or in conformity with applicable Federal law, is subject to approval by the Secretary of the Interior, shall be presented to the Superintendent of the Jicarilla Apache Reservation within ten (10) days following its approval by the President of the Jicarilla Apache Tribe, or in the event of presidential veto — within ten (10) days following the date of its repassage over such veto by a three-fourths majority of the tribal council as provided by Article XVI, Section 1(e). The superintendent shall, within ten (10) days following receipt of such ordinance or resolution, transmit it to the Secretary of the Interior with his recommendation for or against approval. Such enactment shall become effective when approved by the Secretary of the Interior, provided that if the Secretary of the Interior shall not disapprove an enactment of the tribal council within one hundred twenty (120) days following its submittal to him for approval action, it shall thereupon become effective.